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Monday, February 01, 2010

The basics: procedural vs. substantive law

Several readers have expressed interest in learning some law. I highly encourage this. Knowledge of legal basics is not only of great practical use in modern society, it is essential for understanding politics and history, regardless of whether you have any interest in becoming a lawyer. I will thus be making a number of posts over the next few months discussing a variety of basic legal concepts. These may include subject matter jurisdiction, personal jurisdiction, the tort of trespass, contract formation, and a variety of other basic legal ideas. Today I write about the crucial distinction between procedural and substantive law.

Procedural law is about how the law gets passed and enforced: who has jurisdiction over whom, and what coercive processes they may use to bring suspected lawbreakers to justice. The famous Miranda lines "you have the right to remain silent...." generally uttered in the U.S. when you are arrested are a species of U.S. federal procedural law. Procedure usually starts in a given case with a great deal of uncertainty and tries to reduce that uncertainty by fairly gathering and evaluating evidence, interpreting the law, and applying those facts to the law to reach legal conclusions.

Substantive law involves every law that is not procedural: it is what we normally discuss when talking about law or politics, namely the laws defining and restricting rights and duties for their own sake, not primarily for the sake of enforcing other laws.

Thus for example modern property, contract, tort, family, and criminal law are substantive legal areas, as are environmental, workplace, traffic, and most other regulations. On the other hand, the laws defining who may sue whom and where, and what does and does not constitute proper arrest, interrogation, and search of criminal suspects, are procedural laws. Historically, just to confuse things a bit, property rights sometimes included rights of coercive procedure, for example the lord who had jurisdiction over his unfree tenants. This made property law in some cases part of the procedural law as well as a substantive law of economic property.

Computer protocols work in layers: wires carry bits of information, and bits of information carry text, pictures, and so on. The raw bits of information are a lower level protocol that carries the text and pictures in a higher level protocol. Language works like this too: at the lowest level, paper has letters written on it. Letters are a lower-level protocol that carries words in a higher level protocol. You can think of the distinction between substantive and procedural law in the same way: the procedural layer is a lower layer that "carries" the substantive law by specifying how it is to be enforced.

We can also think of government and government-like entities as lower levels of the legal protocol. Indeed, it is very useful to study political structures alongside procedural law. Think of coercive entities like police and courts as the paper and pencil, procedural law as the letters, and substantive law as the words and sentences we want to make out of these raw materials.

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Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

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"Like most blogs worth my attention, this blog is updated only infrequently. That is because the authors of blogs worth my attention only post when they have something to say that is true, relevant and not already known by their audience. Most of the human race does not have the skill to know when an idea has these three properties. The skill is particularly rare in the fields of politics and economics, which is why this blog is such a rare and valuable thing." -- Richard Hollerith

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Posted by Nick Szabo at 11:58 PM

8 comments:

Ivan Nilin Navi said...

Great to see you blogging again. I will follow this series with great interest. Will you also continue your history of Rome?

6:23 PM

nick said...

Thanks. I'll be doing some Roman stuff as well.

2:20 AM

Alrenous said...

When I look, I naturally want to make a distinction between procedures dealing directly with the suspect - Miranda rights, detainment and so on - and procedures for dealing with evidence gathering and argumentation.

Is there a word for this further distinction?

Why isn't the who and whom of civil suits defined substantively? (I think I get the 'where' bit.)

9:03 AM

nick said...

Alrenous, I agree that's a good distinction. I don't know of a single word or official phrase for it. Note that both can involve coercion (e.g. subpoena of witnesses). Although coercion of third parties, unlike coercion of suspects, leaves a bad taste in my mouth, it's a normal and necessary part of the system.

On your second question, by who and whom do you just mean plaintiff and defendant? The area called "personal jurisdiction" is about who and whom can be plaintiff or defendant in what court(s), although it's usually based on where the plaintiff and defendant were or are and where the court(s) are. In the Middle Ages it was more common to base it on status, e.g. merchant fair courts had personal jurisdiction over people who had the status of "merchants" and attended the fair, even if the act in dispute occurred outside the fair. Status can still sometimes be a distinction e.g. with military court jurisdiction over members of the military. But it's mostly based on whose territory the act occurred in or that you are in when the suit is brought. Personal jurisdiction is a big topic in the Civil Procedure course. I discuss it here and here.

3:35 PM

Alrenous said...

If there isn't a word, I get to make one up. Nifty.

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7:22 PM

TGGP said...

Surprised there was no mention of "substantive due process".

10:22 AM

nick said...

Lawyers love a good oxymoron. :-) "Substantive due process" can be taken as referring to substantive areas of law that should be outside of anybody's jurisdiction, i.e. that nobody has jurisdiction over. The issue of determining whether a court has jurisdiction over a certain substantive area of law is called subject matter jurisdiction -- a future "basics" post. It violates a procedural law (subject matter jurisdiction) to enforce the law in certain substantive areas. So the phrase actually makes sense. I recount some of the history here.

1:03 PM

Anonymous said...

@Alrenous

I'm not sure there is a distinction to be made when it comes to Due Process. Procedure is the artifice we've created for the benefit of the suspect and the regular old citizens. The procedural standards for dealing with evidence and litigation exist to protect against the arbitrary treatment of the individual. It's not the evidence that feels violated if it gets illegally seized - it's the person who owns the evidence.

10:49 PM

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